

Testimony of Susan Davis
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Before the Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives

“Restoring Balance and Fairness to the National Labor Relations Board”

February 14, 2017

Good morning, and thank you Chairman Wahlberg, Ranking Member Sablan, and distinguished Members of this Subcommittee for giving me the opportunity to appear at this hearing. My name is Susan Davis, and I am a partner at the law firm of Cohen, Weiss and Simon, LLP in New York City, a firm that has served the interests of working people and their unions for more than 65 years. I have been with the firm for more than 35 years representing unions of nurses, musicians, truck drivers, laborers, airline pilots, steelworkers, letter carriers, autoworkers, actors, broadcasters, recording artists and a myriad of other workers across the country. Together with Cohen, Weiss and Simon, I served as general counsel to the International Brotherhood of Teamsters and the United American Nurses. Currently, I am national counsel to the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), Actors' Equity, the New York State Nurses Association, and a number of local labor unions in New York City.

During the past 30 years, I have practiced extensively before the National Labor Relations Board. I am here to respond to some of the over-heated rhetoric and criticism related to recent actions of the NLRB.

I want to specifically address four actions of the NLRB that have garnered the most attention: 1) the NLRB Election Rule; 2) *Specialty Healthcare* and the Board's standard for determining appropriate bargaining units; 3) *Browning-Ferris* and the Board's joint employer

standard; and 4) *Murphy Oil* and the Board's treatment of arbitration agreements that include a waiver of class and any form of collective claims. I address these in turn.

NLRB's Election Rule

On February 6, 2014, the NLRB issued a Notice of Proposed Rulemaking (NPRM) to modify procedures applicable to the processing of representation petitions. Through notice-and-comment, the NLRB ultimately accepted more than 70,000 comments on the NPRM and with four days of public hearings that resulted in over 1000 transcript pages of oral commentary.¹ See 79 FR 74311. On December 15, 2014, the NLRB adopted its Final Rule ("Election Rule") on representation procedures, which took effect on April 15, 2015.

While the employer community has charged the Board with creating "ambush" or "quickie" elections, in reality, the Election Rule makes modest, common-sense changes to the Board's representation procedures to eliminate delays that had plagued the election process for decades. The new Rule reduces unnecessary litigation, streamlines hearings, and modernizes the procedures. These changes not only allow election cases to be resolved more expeditiously and more efficiently, but they also reduce opportunities for manipulation of the representation process that allowed parties to gain unfair advantage and discouraged workers' free choice.

The Election Rule allows parties to file representation petitions and documents electronically, and standardizes the scheduling of pre-election hearings to avoid unnecessary delays. It also reduces unnecessary litigation by requiring parties to state their positions on relevant issues prior to the pre-election hearing, and then focuses the hearing on relevant issues

¹ The NLRB initially issued the NPRM on June 22, 2011, and adopted a final rule on December 22, 2011. 76 FR 80138. A federal court later held that the Board lacked a quorum when it issued that final rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F.Supp.2d 18 (D.D.C. My 14, 2012). When a fully-confirmed Board re-issued the NPRM on February 14, 2014, it did so under the same docket number so as to allow the Board to consider all comments and oral commentary submitted in response to the initial NPRM. 79 FR 74311. It provided another 60-day period to submit any additional comments and a 7-day period for reply comments, as well as held 2 additional days of hearings for oral commentary. *Id.*

that truly are in dispute. The Rule tightens the election timeline by allowing Regional Directors, in their discretion, to defer questions regarding voter eligibility and the inclusion of a small number of workers in the unit until after the election; it encourages closing arguments rather than post-hearing briefs; and, by expanding the post-election review procedures, eliminates the need for an automatic post-hearing 25-day election stay. In order to utilize technological advances in the past 25 years and facilitate employee free choice, the Election Rule also expands the contact information for workers that unions are entitled to receive prior to the election. Many of these administrative changes mirror procedures at other administrative agencies and in the federal courts.

Importantly, federal courts have rejected the two challenges to the Election Rule.

Associated Builders and Contrs. of Tex., Inc. v. NLRB, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the U.S. v. NLRB*, 118 F.Supp.3d 171 (D.D.C. July 29, 2015). In sustaining the Election Rule, the Fifth Circuit wrote,

[T]he Board identified evidence that elections were being unnecessarily delayed by litigation..., and that certain rules had become outdated as a result of changes in technology... It conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions. Because the Board acted rationally and in furtherance of its congressional mandate in adopting the rule, the [employer] entities' challenge to the rule as a whole fails.

Associated Builders, supra, 826 F.3d at 229.

Nearly two years of experience under the Election Rules demonstrates that employers' concerns about the changes were overblown. Employers' claims that shortening the period between the filing of the representation petition and the election would lead to an increase in unions' election win rate have not materialized. While the Election Rule did reduce the time it takes to conduct an election, statistics show that the union win rate--64% in the year before the

Rule went into effect and 66% last year--barely budgeted. *NLRB Annual Review of Revised R-Case Rules*, <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (last visited February 12, 2017). In a like vein, the total number of petitions filed and the overwhelming number of elections--92%-- that did not require a hearing because the parties stipulated to an election agreement remained the same. *Ibid.*

The Election Rule has accomplished its goal – to reduce unnecessary delays in the processing of representation petitions, increase transparency and utilize technology – without changing any of the broader representation case dynamics or results. Both unions and employers have settled into the new norms, with neither side being advantaged by the modest but meaningful procedural adjustments the Board made.

Specialty Healthcare & Rehab Ctr. of Mobile, 357 NLRB 934 (2011), aff'd. Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013)

In *Specialty Healthcare*, the Board clarified the application of its traditional community of interest standard to be applied where a union seeks to represent a particular group of workers and the employer claims the petitioned for unit is not appropriate because it excludes certain other workers. The Board wrote

We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Specialty Healthcare, 357 NLRB at 945-946. In other words, an employer cannot displace a proper unit proposed by the petitioning party unless the it can show that the excluded workers share an overwhelming community of interest with those in the petitioned-for unit.

There is certainly nothing radical about this decision. In fact, the “overwhelming community of interest” language is drawn from a decision of three Republican-nominated judges on the D.C. Circuit Court of Appeals. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). Seven additional federal circuit courts have upheld the Board’s application of *Specialty Healthcare*. See *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (enforcing the original *Specialty Healthcare* case); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy’s, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016).

In enforcing the *Specialty Healthcare* decision and acknowledging that it was not a departure from precedent, the Sixth Circuit wrote:

[T]he Board did cogently explain its reasons for adopting the overwhelming-community-of-interest standard. The Board explained the need to clarify its law, acknowledging that it had used some variation of a heightened standard when a party (usually an employer) argues that the bargaining unit should include more employees. The Board explained that it has sometimes used different words to describe this standard and has sometimes decided cases such as this without articulating any clear standard... It is not an abuse of discretion for the Board to take an earlier precedent that applied a certain test and to clarify that the Board will adhere to this test going forward.

Kindred Nursing Ctrs. East, LLC v. NLRB, 727 F.3d 552, 562-563 (6th Cir. 2013) (internal quotes and citations omitted). See also, *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 525 (8th Cir. 2016) (“We conclude that the overwhelming community of interest standard articulated in *Specialty Healthcare* is not a material departure from past precedent and is consistent with the requirements of section 9(b) of the Act.”).

The employer community has assailed this decision as setting a new standard that invites the proliferation of what it calls “micro” units that will gerrymander workforces. As with the rhetoric

surrounding the Board’s Election Rule, this fear has not been realized in the five and half years of experience since the decision issued. As the chart below shows, the median size of approved bargaining units *has remained constant* in the five years prior to *Specialty Healthcare* and subsequently through FY2016, fluctuating between 24 and 28, with a median size of 26 in FY2016.

Median Size	
FY07	24
FY08	26
FY09	24
FY10	27
FY11	26
FY12	28
FY13	24
FY14	26
FY15	25
FY16	26

Median Size of Bargaining Units in Elections, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections> (last visited February 12, 2017).

Here too, actual facts, not alternative facts, must guide our analysis.

***Browning-Ferris Ind. of Cal.*, 362 NLRB No. 183 (2015)**

The NLRB’s decision in *Browning-Ferris* provides another example of over-heated criticism of the Board. In *Browning-Ferris*, the Board restated its joint employer standard and reaffirmed its commitment to the standard articulated by the Third Circuit in *NLRB v. Browning-Ferris Ind. of Penn., Inc.*, 691 F.2d 1117 (3rd Cir. 1982) – that two or more entities that share or codetermine those matters governing essential terms and conditions of employment will be found to be joint employers. In determining whether putative joint employers meet this standard, the Board will 1) inquire whether there exists a common law employment relationship between the employees and the putative joint employer, and if so, 2) inquire whether the putative joint

employer possesses sufficient control over essential terms and conditions of employment to permit meaningful collective bargaining. *Browning-Ferris, supra*, sl. op. 2.

The Board explained that its earlier decisions in *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.*, 772 F.2d 894 (3rd Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984), “marked the beginning of a 30-year period during which the Board – without any explanation or even acknowledgement and without overruling a single prior decision – imposed additional requirements that effectively narrowed the joint-employer standard.” *Id.* at 10. Noting that *TLI* and *Laerco* precluded weighing certain factors of control that the Board, for decades, had considered in its joint employer analysis, the Board found that these decisions improperly “repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status,” without any analysis or justification. *Id.*

The Board also criticized more recent decisions such as *TLI* and *AM Property Holding Corp.*, 350 NLRB 998 (2007), *enfd. in rel. part sub nom.*, *Service Employees Int’l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2nd Cir. 2011) for restricting its joint employer analysis by “refus[ing] to assign any significance to contractual language expressly giving a putative employer the power to dictate workers’ terms and conditions of employment.” *Id.* These decisions similarly ignored facts establishing that a company “indirectly exercised control that significantly affected employees’ terms and conditions of employment.” *Id.*, citing *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002)(“[t]he essential element in [the joint-employer] analysis is whether a putative joint employer’s control over employment matters is direct and immediate.”).

The Board in *Browning Ferris* rejected these restrictions as inconsistent with both a common law inquiry, which is required by the Taft-Hartley Act, and decades of established

precedent. Following passage of the Taft-Hartley Act, the Supreme Court held that the “proper standard” for determining an employment relationship under the National Labor Relations Act is “the [common] law of agency.” *NLRB v. United Ins. Co. of Amer.*, 390 U.S. 254, 256 (1968). Under the common law of agency, “[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” *Restatement (Second) of Agency* § 220(1). In applying the law of agency, “there is no shorthand formula or magic phrase that can be applied” to determine whether an employment relationship exists; rather “*all of the incidents of the relationship* must be assessed and weighed with no one factor being decisive. What is important is that the *total factual context* is assessed.” *Id.* at 258 (emphasis added).

By eliminating restrictions on its common law analysis, the Board’s *Browning-Ferris* decision simply realigned its jurisprudence to again require consideration of all facts relevant to the right to control inquiry.² Hence, it decided that it would “no longer require that a joint employer not only *possess* the authority to control employees’ terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.”³ *Id.* at 2 (emphasis in original). Additionally, the Board “will no longer require that a joint employer... exercise [its] authority... directly, immediately, and not in a ‘limited and routine’ manner,” *id.* at

² It should be noted that the standard prior to *Browning-Ferris* also required a multi-factor analysis. While there may have been fewer factors to weigh, the Board still examined a number of factors on a case-by-case basis to make joint employer determinations, and much grey area existed. Thus, the oft-repeated claim that *Browning-Ferris* overruled a bright-line rule and replaced it with an ambiguous case-by-case analysis is simply not accurate.

³ While the dissent characterizes this retained control, or right to control, as “potential” control, *Browning-Ferris*, *supra*, sl. op. 22, the majority’s decision more narrowly only refers to control over terms and conditions of employment that a putative joint employer explicitly *retains*, most commonly in contract provisions. This analysis of the right to control is required by the common law. See *Restatement (Second) of Agency* § 220(1).

15-16, because “[i]f otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status.” *Id.* at 2.

Importantly, the Board stated that the previously eliminated factors would only be *probative* of a joint employer relationship, not that they would be determinative. *Browning-Ferris, supra*, sl. op. 16 (“[t]he right to control, in the common-law sense, is *probative* of joint-employer status, as is the actual exercise of control, whether direct or indirect.”). Additionally, the Board explicitly stated that it was making no findings as to any contractual relationship other than the one at issue in the case—it expressly made clear it was not addressing matters such as franchising. *Id.*, sl. op. 20, fn 120.⁴ Thus, the Board’s decision merely requires that all factors are considered in the unique factual context of every case, which is exactly what the common law requires.

Much of the hysteria surrounding *Browning-Ferris* stems from the General Counsel’s consolidated complaints against corporate McDonalds and some of its franchisees. 02-CA-093893, *et al.* However, these complaints issued prior to *Browning-Ferris*, an indication that the General Counsel believed corporate McDonalds was a joint employer with its franchisees under the previous standard. It is my understanding that the evidence in that case shows that McDonalds exercises an extraordinary level of control over the terms and conditions of its franchisees’ employees.

The General Counsel’s treatment of another franchisor, Freshii, is illustrative of the individual analysis that will be applied in each case. The General Counsel determined that

⁴ “The dissent is simply wrong when it insists that today’s decision “fundamentally alters the law” with regard to the employment relationships that may arise under various legal relationships between different entities: “lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer.” None of those situations are before us today, and we decline the dissent’s implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination.”

Freshii did not exert sufficient control over the terms and conditions of employment of its franchisees' employees to be a joint employer, even if applying a broader standard such as the one adopted in *Browning-Ferris*. Adv. Memo. Nutritionality, Inc. d/b/a Freshii, 2015 WL 2357682 (NLRB Div. of Adv. April 28, 2015). The different treatment of these two franchisors shows that the General Counsel intends to examine the facts of each case, and only assert that franchisors that exert enough control to establish a common law employment relationship will be considered to be joint employers.

The employer community's portrayal of *Browning-Ferris* as a threat to ordinary contracting-for services and the franchise model is unwarranted. The *Browning-Ferris* decision was modestly crafted to ensure that the Board's joint employer analysis will cover precisely those employers that Congress intended to be covered by the NLRA – common law employers – and no others.

Murphy Oil, 361 NLRB No. 72 (2014)

The Board's decision in *Murphy Oil* and other decisions finding class action and collective waivers to be unlawful has also engendered unjustified criticism. In *Murphy Oil*, the Board held that employers could not force unrepresented employees, on threat of termination, to agree to arbitrate all workplace disputes solely as individuals, that is, to waive their right to file collective court and arbitration cases. As discussed below, here is nothing novel about the Board's decision. Rather, it applied long-accepted law to an employer policy that effectively abrogated employees' right to act collectively.

The Supreme Court long ago upheld both legs of the Board's reasoning in *Murphy Oil*. First, the Court held that the National Labor Relations Act's "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working

conditions through resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). That makes sense, as a statute designed to promote labor peace by protecting employees’ right to strike to remedy substandard wages surely protects employees’ right to sue to remedy substandard wages. Second, more than 75 years ago, the Court held that an employer could not induce employees to contract away their rights: “Obviously, [an] employer[] cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes.” *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). These venerable principles are the foundation of the *Murphy Oil* decision.

The Courts of Appeals for both the Seventh and the Ninth Circuits have upheld the Board’s reasoning in its class and collective action waiver decisions. *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). Indeed, the Ninth Circuit held not simply that it was a permissible construction of the Act, but that “[t]he NLRA is unambiguous” and “the Board’s interpretation . . . is correct.” 834 F.3d at 983.

While the matter is now before the Supreme Court, the Board’s position is firmly rooted in the language of the statute, Supreme Court precedent, and logic.

Conclusion

I hope my testimony today shows that the over-heated rhetoric and criticism leveled at the NLRB over the past few years has been unwarranted. The Board’s Election Rule has not made it easier for unions to win elections. *Specialty Healthcare* has not proliferated so-called “micro” units. *Browning-Ferris* merely restored the full common law inquiry to the joint

employer standard and has not resulted in a spate of franchisors being declared joint employers with their franchisees. *Murphy Oil* simply applies long-established principles to new policies.

Nor has the Obama Board been one-sided in its decision-making. It has ruled against unions and workers on several important issues, including holding that certain union policies regarding dues obligations are unlawful, *Machinists Local Lodge 2777*, 355 NLRB 1062 (2010), *IBEW Local 34*, 357 NLRB 401 (2011); that a union interfered with an election when it financed a lawsuit that was filed against the employer during the pre-election period, *Stericycle*, 357 NLRB 582 (2011); and that back pay may not be awarded to unlawfully fired undocumented immigrants, even where the employer knew that the workers lacked work authorization, *Mezonos Maven Bakery*, 357 NLRB 376 (2011).

With income inequality at an all-time high and so much of this nation feeling financial pressure and insecurity, now more than ever, employees' rights to collective bargaining must be protected. In enacting the National Labor Relations Act, Congress recognized that strong unions were a critical component of re-building a middle class in this country, and history has borne that out. To attempt to neuter the Act and the Board now will only serve to increase income inequality and worsen the condition of the hard-working Americans the President pledged to protect. Exaggerated criticism of the modest and well-grounded actions the Board has taken over the past few years is not what is needed. I urge the Members of this Subcommittee to reject these attacks against the NLRB, and instead work to promote its mission.

Thank you for considering these comments.